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Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~1664~~ 70-338

COTLER DRUGS, INC., *et al.* AND LOUIS PATLOGAN, FORMERLY DOING BUSINESS AS PATLOGAN'S WESTERN PHARMACY, PETITIONERS,

versus

CHAS. PFIZER & CO., INC., *et al.*, STATE OF WEST VIRGINIA, *et al.*, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT COURT

BRIEF IN OPPOSITION FOR RESPONDENT STATES OF SOUTH CAROLINA AND MONTANA

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OPINIONS BELOW

The opinion of the District Court for the Southern District of New York is reported at 314 F. Supp. 710. It is included as Appendix I of the Petition and will be referred to herein as "Pet. Appen. I." The opinion of the Court of Appeals for the Second Circuit, unanimously affirming the district court, is reported at 440 F. (2d) 1079. It is included in the Petition, as Appendix II, and will be referred to as "Pet. Appen. II." Page cites will be made to these appendices.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The judgment of the Court of Appeals for the Second Circuit was entered on March 29, 1971, and no rehearing or extension of time was sought or granted.

QUESTION PRESENTED

Did the court of appeals err in affirming the district court's approval of a class action settlement which gave certain allocations that the district court found to be fair, reasonable and adequate.

STATUTES INVOLVED

Rule 23(e) of the Federal Rules of Civil Procedure, Title 28, United States Code of Laws, provides:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT

The State of South Carolina instituted one of sixty-six treble-damage actions filed against certain manufacturers of broad-spectrum antibiotic drugs charged with antitrust violations under the Sherman Act, 15 U.S.C. §§ 1 & 2. Compromise of these claims was effected between the defendant manufacturers and the plaintiffs to the ensuing class actions. The plaintiffs were comprised of two classes, a CCS class (cities, counties and states representing themselves and all consumers within their jurisdiction) and a wholesaler-retailer class, representing druggists throughout the United States.

The proposed settlement was approved pursuant to Fed. R. Civ. P., Rule 23(e) by District Judge Wyatt on

September 18, 1970. Pet. Appen. I. On appeal from the district court's approval by the petitioners herein, the Court of Appeals for the Second Circuit, on March 29, 1971, unanimously affirmed the approval of the settlement. Pet. Appen. II. The petitioners now continue in their attempt to impose a reallocation of the settlement fund, which would favor the wholesaler-retailer class, to the great detriment of the consumer class.

The State of South Carolina adopts as its further statement of the case Judge Wyatt's exhaustive statement of the proceedings as contained in Pet. Appen. I.

ARGUMENT

I

In establishing procedures for providing notice of the proposed settlement of a class action, as is required by Fed. R. Civ. P., Rule 23(e), did the district court commit errors of law or abuses of discretion in its prescription of the manner in which notice was to be furnished to members of the class?

A. The petitioners have raised the issue of notice to the consumers and have objected that such notice was actually an assignment by silence and therefore deprives the consumer of due process. Pet. 58-59. One would assume the petitioners are speaking of the possible consumers that did not actually see the notice by publication rather than the ones that saw the notice and made the decision to authorize their respective Attorney General to recover on their behalf. The court of appeals considered this issue, Pet. Appen. II at 22-23, and stated on that question:

> Undoubtedly there were also those who did not receive notice, and it is with this group we should be concerned. Since under the revised rule those in a [Rule] (b) (3)class who do not elect to opt out will

> be bound by the judgment, it is difficult to see how those who do not receive notice but on whose behalf damages are awarded to the state are in any way harmed by permitting the use of this procedure. To require those who wish to authorize the state to recover for them to affirmatively notify the court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum. Pet. Appen. II at 23.

The three cases cited for the petitioners' position, Pet. 58-59, were cited, discussed and distinguished in briefs before the court of appeals and that court apparently found nothing constitutionally defective, an irreconcilable difference in decisions or abuse of discretion.

B. The petitioners also attack the notice sent to the wholesaler-retailer class in two aspects. Pet. 63. The contention of the petitioners that notice was sent only to those wholesalers-retailers in business in 1969, and therefore defective, Pet. 63, was dealt with by the court of appeals which said,

> This contention is without merit since the second notice went beyond the Clark-O'Neill trade list to include anyone whose name was available. In addition, it appears that at a later stage in these proceedings when the district court administers the intra-class distributions, individual claims will again be considered Pet. Appen. II at 24.

A further objection of the petitioners is that the settlement offer had a "'predetermined allocation." Pet. 64. This is completely untrue as can be shown by the district courts decision, Pet. Appen. I. An offer of settlement dated February 6, 1969, was to the effect that the $100,000,000 was unallocated and that anyone accepting the settlement could present to the court a proposed plan of allocation. Pet. Appen. I at 24. Pursuant to a court order of June 16, 1969, and modified on June 18, 1969, notice was given to

members of the wholesale-retail class giving each member an opportunity to opt out of the $100,000,000 settlement, which was not allocated. Pet. Appen. I at 28. Because of the formula set forth in the offer of settlement by the defendants of February 6, 1969, all accepting plaintiffs then could submit a proposed plan of allocation by September 2, 1969. Pet. Appen. I at 31. Several plans were presented. Pet. Appen. I at 31, 32. It appearing that the plaintiffs could not agree on a proposed allocation plan, the defendants, pursuant to the settlement offer of February 6, 1969, filed their "Election by Defendants to Proceed with a Modified Plan Allocation" on October 20, 1969. Pet. Appen. 1 at 41. A hearing was then held on March 24, 1970, before District Judge Wyatt to determine the adequacy of the Modified Plan of Allocation by the Defendants, pursuant to notice by the court of the hearing on February 6, 1970. Pet. Appen. I at 46 and 67. It was the decision of Judge Wyatt rendered on June 24, 1970, Pet. Appen. I, that was the final determination of the allocation to the petitioners. The petitioners' plea of a predetermined allocation is unfounded as evidenced in the record of this action.

The further claim of the petitioners that they should have been offered a second right to opt out when the court changed its scheme of administration of the settlement in mid-stream, Pet. 65, is also unfounded as evidenced by the record of this action as there was no change.

II

In approving the settlement of the national class action involved herein, such approval or disapproval being required by Fed. R. Civ. P., Rule 23(e), the district court did not commit any errors of law in ascertaining the standards upon which to base its approval, nor did the district court abuse its discretion in the application of these proper standards for settlement.

A. The very essence of a settlement proceeding is that it allows the parties thereto to satisfy claims without having to litigate the merits of the case. Indeed, to litigate the legal and factual issues would emasculate any efforts at a compromise as one party or the other would lose most, if not all, incentive to mitigate its position, thereby leaving the weakened party with the choice of a forced settlement or a costly and perhaps even more ruinous litigation. See *Florida Trailer and Equipment Co. v. Deal*, 284 F. (2d) 567 (5th Cir. 1960); Pet. Appen. II at 10-11; Pet. Appen. I at 70.

Rule 23(e) of the Federal Rules of Civil Procedure was drafted and enacted in order to permit parties to class actions to avoid the expense and uncertainty of litigation and to encourage settlement. *Florida Trailer and Equipment Co. v. Deal* at 571; *Uline v. Uline*, 205 F. (2d) 870 (D. C. Cir. 1953). Accordingly, the trial courts are vested with flexible discretionary powers to approve or disapprove proposed settlements in order to protect the interests of the members of the classes involved, while at the same time forwarding the worthy objectives of compromise.

Recognizing these facts, federal courts, to include this Court, have laid down general standards by which trial courts can measure the propriety of approving proposed settlements, In *Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson*, 390 U. S. 414,

424 (1968), this Court in reviewing on certiorari an approval of compromises of claims against a debtor stated:

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the . . . judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation. *Id.* at 424-425.

It is submitted that this guidance is equally pertinent to compromises under Fed. R. Civ. P., Rule 23(e) and is the proper standard upon which trial courts may rely, affording both the flexibility necessary to effect compromise, and the due process protection of members of the classes to the suit. Hence there was no error of law committed by the district court in adopting standards, as articulated by this Court in *TMT Trailer Ferry v. Anderson*, *supra*. Pet. Appen. II at 9-10; Pet. Appen. I at 69-70.

B. But notwithstanding the district court's adoption of proper standards by which to measure the merits of the proposed settlement, the petitioners make multiple allegations that the district court has abused its discretion in applying these standards to the facts of this case. However, this is a charge which the petitioners have failed to substantiate.

It is a well established legal principle that judicial discretion will not be disturbed unless there is a clear showing of abuse, and that showing must be borne by the petitioners. As was stated in *Connecticut Ry. & Lighting*

Co. v. New York, N. H. & H. R. Co., 190 F. (2d) 305 (2d Cir. 1951):

> It is well settled that the approval of a compromise is a discretionary order which can be reversed only upon a clear showing of an abuse of discretion. *Id.* at 308.

And in the case of *Delno v. Market St. Ry. Co.*, 124 F. (2d) 965 (9th Cir. 1942), the court defined discretion and its abuse as follows:

> "[D]iscretion" is defined as: "The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." 1 Bouv. Law Dict., Rowles' Third Revision, p. 884 . . . Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action by the trial court, then it cannot be said that the trial court abused its discretion. *Id.* at 967.

Accord, *Lines v. Falstaff Brewing Co.*, 233 F. (2d) 927 (9th Cir. 1956).

The petitioners argue that abuse was committed for divers reasons. First they say that the district court misconstrued, misapplied, and misconceived the decision of this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968). Pet. at 25-28. The petitioners contend that the *Hanover* case proscribes the use of "pass-on" as a defense to an anti-trust suit, and that consequently the district court's progmatic consideration of the clear fact that the wholesaler-retailer class suffered no injury, because it passed on the increase to the consumers at a substantial profit, constitutes a violation of principles laid down in *Hanover*. However, the petitioners completely ignore the

distinguishing characteristics of *Hanover* as compared with the case at hand. These distinctions include the facts that considerations of "pass-on" are not being used to allow the defendants to escape liability, and that such determinations will not frustrate private treble-damage claims. These issues were thoroughly discussed and considered by the circuit court. See Pet. Appen. II at 12-17. In light of these facts, and because the task of the district court was not to litigate the legal merits of applying a "pass-on" defense to the facts of this case, but rather only to weigh the strength of the plaintiffs' case against the settlement offer to insure that the settlement was fair, reasonable, and adequate, Pet. Appen. I at 69, it is clear that recognition that the petitioners had not been injured due to "pass-on" was not an abuse of the court's discretion.

The petitioners further allege that the decision of the Court of Appeals is in direct conflict with the decisions of other circuit courts as to questions of "pass-on," the standing of consumers to sue, and cost-plus situations. Pet. at 28. Aside from district court cases and cases of the Second Circuit subject to overrule, petitioners cite the following cases as conflicting on questions of the "pass-on" doctrine, and the standing of consumers to sue: *Commonwealth Edison Co. v. Allis Chalmers Manufacturing Co.*, 335 F. (2d) 203 (7th Cir. 1946); *Mangano v. American Radiator and Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa.), aff'd 438 F. (2d) 1187 (3d Cir. 1971). Pet. at 29 However, these cases are founded on the same factual circumstances and policy considerations as was in *Hanover Shoe, Inc.* In these cases, retail purchasers face a substantial legal hurdle in establishing that any overcharge they have paid was a result of the manufacturers price fixing, thereby discouraging suits by individual retail consumers and insulating the price-fixers from liability. This is not the

situation with the present case, despite the fact that the petitioners refuse to recognize these critical distinctions. These facts are germaine to the discretionary actions of the district court and consequently the petitioners have failed to support their allegations of abuse.

Petitioners also allege conflicts of decisions with other circuit Courts as to questions of what constitutes a cost-plus situation within terms of *Hanover Shoe, Inc., supra.* Pet. at 31. They say the question turns in other circuits on whether there was in fact a cost-plus contract, and cite district court cases for authority. Pet. at 32. This spurious assertion is not worthy of this Court's consideration.

Petitioners further assert that the district court has abused its discretion by failure to protect the interests of the members of the litigating classes through failure to fully consider all facts, and petitioners make further nebulous assertions as to the district court relying too heavily on collusive advice of counsel. Pet. at 33-38. These allegations are without merit and are refuted by the records of the proceedings of the trial court, which court relied precisely on the guidance furnished by this Court in *Protective Committee for Stockholders of TMT Ferry, Inc. v. Anderson, supra.* Unlike the case of *Cohen v. Young,* 127 F. (2d) 721 (6th Cir. 1942), upon which the petitioners rely, Judge Wyatt diligently conducted full investigations of the case, and further completely satisfied himself that "the proposed compromise was the result of good faith bargaining [by opposing counsel] at arm's length." Pet. Appen. I at 71.

Another justification asserted by petitioners as reason for a writ to issue is that this Court has granted certiorari to review the reversal of the criminal conviction of three of the five defendants herein in *United States v. Chas. Pfizer,* 437 F. (2d) 957 (2d Cir. 1970). If the conviction is affirmed

then it is claimed that the rationale of the district court's decision in approving the settlement becomes unsustainable, Pet. at 56, and that consequently the criminal proceeding and this case should be reviewed together. However, what petitioners fail to consider is that the matter before this Court on this petition turns not upon what a fair, reasonable, and adequate decision might be in the future, but rather what it was on September 18, 1970 when Judge Wyatt issued his opinion. Consequently, this argument by the petitioners has no merit.

III

Should this court consider issues outside of the scope of the Judgment below?

Petitioners say: "Decision of court of appeals has practically eliminated private action under Section 4 of Clayton Act as a vital means of enforcing the Antitrust Policy of the United States and, therefore, is in conflict with decisions of the Supreme Court of the United States." Pet. at 21.

The petitioners state that the court of appeals decision here has made the public action exclusive by "virtually eliminating" the private action under §4 of Clayton Act, and that it has "given to public entities under a hybrid *parens patriae*—Rule 23 representation theory . . . the **exclusive** right to enforce the antitrust laws." Pet. at 24. They state further that "the thrust of the Court's opinion is to strike directly at the basis of the right of direct purchasers of the price-fixers to maintain actions for treble-damages under . . . the Clayton Act." Pet. at 21.

Nowhere do the petitioners explain, nor is it apparent, how the decision of the court of appeals fosters these alleged results. The court of appeals, in fact, felt that the settlement approved by the district court, if anything, encourages private enforcement of treble-damage claims. Pet.

Appen. II at 16. Petitioners insist on the temeritous assertion that the district court and court of appeals approved of the application of *parens partriae* doctrine in this case when both courts expressly rejected the *parens patriae* doctrine as constituting any foundation for their decisions. Pet. Appen. II at 18-19. The representation of the private consumers by the divers government entities was expressly accomplished through a class action under Fed. R. Civ. P. 23 and was effected in a proper manner to allow those private parties not wishing to settle to opt out, thus preserving their private right to litigate.

As to charges that direct purchasers from price-fixers have had their right of private suit affected by the settlement, it would appear that the petitioners misunderstand the nature of their motion before this Court for a writ of certiorari. The petitioners here apparently refer in this statement to the fact that for the purpose of settlement the district court approved a determination of fact that actual injury to the wholesaler-retailer class was nil due to the fact that the wholesaler-retailer class passed on their costs to the consumer and collected a substantial mark-up in the process.

However, the purpose of a settlement is not to litigate points of law and is not to establish the respective legal liability of the parties, one to the other—this would in fact defeat the settlement objectives of obtaining a rationale compromise between parties based on arms length negotiation. The task of the trial court under Rule 23(e) is to ascertain that such compromise is "fair, reasonable, and adequate," based on the court's view of the ostensible strength of the plaintiffs' case on its merits, balanced against the amount offered in settlement by the defendants. Pet. Appen. I at 69. This the district court has done, and this was approved on appeal.

The question before this Court is not one, as the petitioners would make to be so, of a determination of the legal question of whether a pass-on defense is legally proper under the facts of this case. It will be time enough to decide that question when it is actually litigated. The question before this Court is whether the district court misconstrued the law or abused its discretion in its determination that based on prior decisions of this Court, and more especially *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968), that the monies offered the wholesaler-retailer were fair, reasonable, and adequate. Clearly the facts of the case, in light of existing law, show the judgment below to be proper.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certorari should be denied.

Respectfully submitted,

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